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Nadja ALEXANDER

Singapore Management University, nadjaa@smu.edu.sg

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Kritik / Critique

Mediation and the Myth of Universality

Nadja Alexander

((1)) In his essay entitled 'Mediation – Pfade zum Frieden', Professor Montada has made an important contribution to the mediation literature. He questions the universality of the standard mediation model that appears to be sweeping the world with enormous zeal and in doing so puts forward theories and principles to substantiate his view.

((2)) To a large extent I agree with what the author has to say about the scope and potential for mediation. In particular I support his view that professional mediators need to be made aware of the cultural limitations of the model in which they are trained (6). As I write these lines I am sitting in Hong Kong – my new home – where after a short period of time as a mediation practitioner, teacher and writer, differences in notions of 'standard' mediation principles, process and practice have emerged. I will elaborate on this aspect of the essay shortly. To my mind however Montada's critique is based upon certain assumptions to which I do not subscribe. It is to these that I first turn.

((3)) Montada refers to the 'Harvardmodell' – as it is known in the German speaking world – as the standard mediation model (5). Although he recognizes that not all mediation practice fits this standard model, the implication seems to be that it is the dominant model in training and practice. While I acknowledge that the book, 'Getting to Yes', originally written by Roger Fisher and William Ury, has had an enormous influence on the development of mediation in western countries, I think we have travelled a long way in terms of theory, education, training and practice since those early days. There have been critiques of the *Harvardmodell*¹ and, in addition, there have been significant developments in mediation theory and training. To the best of my knowledge the term 'Harvard model' or similar is not used in the English speaking world to refer to the standard facilitative or interest-based mediation product. I have come across the term in German speaking circles only.

((4)) While the *Harvardmodell* is an example of what I will refer to as facilitative mediation, it is not the only model. Moreover to my mind, it is not the standard model for mediation training. My own experience suggests that to the extent that a standard model of mediation training exists, it:

- is interest-based;
- focuses on party interests, needs and emotions; it does not ignore emotions as Montada suggests (5);
- is future-focused but does not, as Montada suggests, leave no space for the past.
- works towards a jointly acceptable outcome which may take one of a number of forms including a legally binding agreement, a memorandum of understanding,

an agreement to disagree, a recognition of a changed relationship, symbolic acts and other forms. It is not limited to agreement or contract as put forward by Montada (32 ff). Finally most training courses with which I am familiar share the view that even where no agreement is reached there can be much benefit from mediation. This contrast with Montada's view of the standard model (60).

((5)) To the extent that Montada's essay is a critique of the *Harvardmodell* rather than my view of the standard model, the relevance of some of my comments is reduced. However, in relation to the *Harvardmodell*, some differences in perspective emerge. Montada takes the view that the standard Harvard procedure encourages parties to take a rational approach, focussing on individual interests, and does not deal with emotions (5, 44, 45, 46). In other words emotions are suppressed as much as possible. I was very surprised to read these lines. My own experience of reading Harvard material and participating in courses run by Harvard many years ago is that considerable attention was given to the role of emotions in mediation. That is not to say that the work on emotions could not have been improved. However it is misleading to suggest that the Harvard model does not deal with emotions and ignores them due to its focus on rationality. In addition, I wonder whether the focus on economic rationalism as the basis for party behaviour is emphasized in the German translations of the *Harvardmodell* because it does not accord with my own English speaking experience of how Harvard's mediation model is taught. While the idea of the rational actor underpins many of the ideas of interest based bargaining, it does not do so to the exclusion of placing a value on, and exploring, emotions.

((6)) In summary I find Montada's assumptions about the standard model of mediation training misinformed in certain aspects. Alternatively our different views may be the result of different cultural and linguistic understandings of the same model.

((7)) I now turn to the comments Montada has made in relation to expanding the scope of the standard mediation model and the theory that supports it.

((8)) In commenting on Montada's bold critique of contemporary mediation, I find myself drawn to the wisdom of another great thinker, Nabil Antaki. Professor Antaki distinguishes between two primary world traditions and mediation, namely intuitive, informal mediation, on one hand, and cognitive, scientific, western mediation on the other.² He suggests that the former brand of mediation continues to be practised in much of Asia, the Pacific, Africa and the Arab and Muslim world, whereas the latter dominates discourse in western traditions spanning regions such as North America, Australia and much of Europe. In his analysis of the historical development of mediation Antaki pinpoints, as Montada has done, the birth of contemporary mediation as occurring around the late 1970s and early 1980s in the North America. Since that time, the forces of globalization – and some would argue, Americanisation – have seen the facilitative model of mediation exported worldwide by first world consultants,

training institutions and universities, and donor agencies including the World Bank, International Finance Corporation, the Asian Development Bank, GTZ (Deutsche Gesellschaft für Technische Zusammenarbeit) and many more.

((9)) Montada's criticism of the assumed universality of facilitative mediation is the most powerful aspect of his essay. In particular his identification of elements of the western model, which may not 'fit' other cultures should be part of all mediation training (57). To that list, I would add the notion of confidentiality, which is integral to the western mediation construct but not a defining characteristic of mediations in which I have participated in Melanesian cultures.

((10)) Culture is an interesting phenomenon because we can only ever examine it from our own cultural perspective and there are inherent limitations in such an approach. Scholars inevitably rely on western constructs of culture to define non-western-ness as most research has been conducted by western scholars. Well-intentioned cross-cultural experts influence decisions in relation to other cultures – such the mediation model most suitable for Solomon Islanders. Such approaches are fraught with danger as they rely on western ways of knowing and doing. In other words exporting a western understanding of a culturally suitable mediation model can be as useful (or not) as exporting a western model of mediation. For culture, however defined, is not static. Rather it is a dynamic and complex experience that builds belief structures, narratives, traditions and customs – and also changes them.

((11)) Today I live in what many researchers would label a collectivist culture. Despite its internationality, Hong Kong remains, and is increasingly, Chinese in its identity. Individual party interests are as important here as interests relating to the group and the status quo. A collective-individualist distinction is inadequate in Hong Kong, as it is in the Chinese mainland. So how can we develop our understandings of mediation to embrace a continuously changing cultural diversity? Let me extend Montada's suggestions with a plea to include *cultural fluency*³ as an integral part of standard mediation training. To be culturally fluent requires an elicitive rather than a directive approach to mediating. Here curiosity is more valuable than the certainty of knowledge as mediators engage mindfully with conflict at substantive, relational and symbolic levels.

((12)) While my focus – and that of Montada – has been on the limitations of the western standard model of mediation, it is important to remember that globalization is not a one way street. While the export of professional mediation began in the West, it is now occurring elsewhere. For example, at the time of writing I am involved in the establishment of an international mediation competition to be based in Hong Kong, and one of our most interesting negotiations is about the standards that we will use to assess students mediators. Will a western or eastern discourse dominate? As eastern cultures engage more directly in the global marketplace, will westerners find themselves subject to new and different mediation values?

Endnotes

- 1 See, for example, K Funken, 'The Pros and Cons of Getting to Yes – Shortcomings and Limitations of Principled Bargaining in Negotiation and Mediation' *Zeitschrift für Konfliktmanagement*. Available at SSRN: <http://ssrn.com/abstract=293381> or doi:10.2139/ssrn.293381; C Provis "Interests vs. Positions: A Critique of the Distinction," Chris Provis, *Negotiation Journal*, 12:4 (October 1996), pp. 305-323.
- 2 N Antaki, 'Cultural Diversity and ADR Practices in the World' in J Goldsmith, A Ingen-Housz and G Pointon (eds) *ADR in Business* (Alphen aan den Rijn: Kluwer Law International 2006).
- 3 On cultural fluency, see M LeBaron, 'Bridging Cultural Conflicts: A New Approach for a Changing World' (San Francisco: Jossey Bass, 2003).

Address

Prof. Dr. Nadja Alexander, City University of Hong Kong, Professor of Law, Tat Chee Avenue, Kowloon, Hong Kong SAR
Email: nadja.alexander@cityu.edu.hk